

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.879/MB-IV/2022

Under Section 9 of the IBC, 2016

In the matter of

S.J ENTERPRISES

a partnership firm through its partners

Mr. Shantilal Parekh & Mr. Jaysukh Patel

...Operational Creditor

v/s.

M/s. OASIS INFRA-VENTURES PVT
LTD.

Through its directors Nagraj Tolaji Mutha,
Anil Nagraj Mutha and Yash Ritesh
Mutha

...Corporate Debtor

Order Delivered on: 10.08.2023.

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Operational Creditor:

None.

For the Corporate Debtor:

Yash Jariwala, Ld. Counsel.

ORDER

Per: Prabhat Kumar, Member(Technical)

1. This is a Company Petition filed under section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by S.J ENTERPRISES a partnership firm through its partners Mr. Shantilal Parekh & Mr. Jaysukh Patel (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of M/s. OASIS INFRA-VENTURES PVT LTD. through its directors Nagraj Tolaji Mutha, Anil Nagraj Mutha and Yash Ritesh Mutha, the Corporate Debtor.

1.1. The Company Petition is filed on 24/02/2020 claiming an amount of Rs. 1,83,69,021/- (debt fell due on 20.04.2019) being the principal amount and the retention money alongwith Rs. 25,00,00,000/- towards compensation, and interest @ 18% p.a. Rs. 13,10,286 (as in calculated from 1st October 2019 till realization) is in default. The date of default is not specified in Part IV of the petition.

2. The Corporate Debtor placed a Work Order dated 01.12.2015 for the work of civil and finishing work as labour contractor for a site project known as River View with the Operational Creditor. Pursuant to the completion of the work, a full and final bill was raised by the Operational Creditor by Invoice dated 20.04.2019 for an amount of Rs. 86,32,103/- (Rupees Eighty-Six Lakh Thirty-Two Thousand One Hundred and Three). Further RA Bill dated 20.04.2019 was raised for an amount of Rs. 50,33,653/- (Rupees Fifty Lakh Thirty-Three Thousand Six Hundred and Fifty-Three Only).

2.1. After the completion of the work, the Corporate Debtor sent a letter dated 05.08.2019 which was received by the Operational Creditor raising

allegations regarding the quality of work done under the Work Order which the Corporate Debtor has not raised before. Further, vide letter dated 30.08.2019 the Operational Creditor cleared all the allegations so raised and put forth the actual facts and demanded payment of the outstanding dues.

2.2. Despite repeated reminders, Corporate Debtor failed to make the above Payment. Therefore, the Operational Creditor issued a demand notice dated 11.11.2019 u/s 8 of the Insolvency and Bankruptcy Code, 2016 requesting for outstanding amount. The Corporate Debtor failed to respond to the Statutory demand Notice within the mandatory 10 days period of receipt of the notice and also failed to make the payment of the outstanding dues within the said permitted period.

3. The Corporate Debtor vide its affidavit in reply dated 19.04.2023 states that the petitioner has not only carried out substandard and defective work, but also refused to rectify any defects as pointed out by the Corporate Debtor; the petitioner has raised bills amounting to Rs.2,07,18,255/- which were duly accepted and paid by the Corporate Debtor. Furthermore, the petitioner raised its final invoices on 20.04.2019 for the sum of Rs. 50,33,653/- against the same work which was never accepted by the Respondent on account of substandard and defective work being done by the petitioner; the Corporate Debtor had not given any approval for additional work; No default under IBC, the intention of the petitioner is to enforce recovery of some alleged debt against the respondent company; pre-existing dispute and material suppression of the fact.

Findings

4. This bench has perused the documents and pleadings available on record and considered the arguments of both the sides.

4.1 The Operational Creditor has claimed the debt in default which mainly comprises of (i) Retention money amounting to Rs. 8,92,979/- (ii) Invoice for additional work amounting to Rs.86,32,103/-, (iii) RA bill for RS. 50,33,653/-, (iv) compensation of Rs.25,00,000, and (v) interest amounting to Rs. 13,10,286/-. It is noticed that no evidence in relation to additional work, having been agreed by the Corporate Debtor has been placed on record and the Corporate Debtor has denied for asking the applicant to conduct such extra work. It is also submitted by the Corporate Debtor that in the absence of an increase in a built area of the project it cannot be said that petitioner has carried out any additional work. As regards RA bill of Rs.50,33,653/- the Corporate Debtor has claimed that this bill was never accepted by them on account of sub-standard and defective work. The Corporate Debtor has placed on record various email communications which suggest that there have been complaints in the quality and delay in delivery of the work. As regards retention money the Corporate debtor claims that retention money is payable only after 12 months from the date of completion of work and since the work has not been completed, hence claimed for refund of retention money is premature as regards claim for compensation the Corporate Debtor submits that it suffered on account of delay of 579 days in delivery of work at each milestone, and is entitled to claim penalty @ 0.15% of the Contract value, and the applicant cannot claim compensation for his deficient and delayed delivery. Accordingly, no claim lies against the Corporate Debtor as such claims are subject to determination in terms of contract with the applicant.

4.2 On 15.05.2023, the applicant requested time to file Rejoinder to the reply and was allowed a liberty to do so even though there is no vested right for filing rejoinder under IBC. However, the petitioner neither appeared nor filed any rejoinder on 09.06.2023, and thereafter in final hearing held on 07.07.2023.

4.3 This Bench is of considered view that the demand notice u/s 8 was issued on 11.11.2019. The Corporate Debtor has placed on record the email communications complaining about poor service and delivery on the part of Operational Creditor. The Operational Creditor has not filed any rebuttal to the communication placed on record by the Corporate Debtor. In view of aforesaid findings, this bench has no hesitation to conclude that there appears to be a dispute pertaining to delivery of goods as well as services connected thereto, and the communication pertaining to such dispute dates prior to issuance of demand notice.

4.4 Further, it will be relevant to refer to paragraph 40 of the judgement of Hon'ble Supreme Court in the case of ***Mobilox Innovations Private Limited v/s Kirusa Software Private Limited***:

40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties, Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly

exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application".

5. In view of the above, we find that the present case is fit for dismissal under Section 9(5)(ii)(d) read with Section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 in view of pre-existing dispute between the parties, which requires adjudication which is beyond the powers vested in this Bench in proceedings arising from an application filed under sec. 9 of the code and deserves to be **Dismissed**.

ORDER

6. The petition bearing CP (IB) No.879/MB-IV/2022 filed by S.J ENTERPRISES a partnership firm through its partners Mr. Shantilal Parekh & Mr. Jaysukh Patel (“the Operational Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of M/s. OASIS INFRA-VENTURES PVT LTD. through its directors Nagraj Tolaji Mutha, Anil Nagraj Mutha and Yash Ritesh Mutha, the Corporate Debtor is **dismissed**.
7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)
10.08.2023.

Sd/-

KISHORE VEMULAPALLI
MEMBER (JUDICIAL)